IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH.

Civil Revision No.5485 of 2007

Date of Decision: November 5, 2007

Dharambir & others .....Petitioners

Versus

N/s Omaxe Housing & Developers Ltd. & another .....Respondents

CORAM:- HON'BLE MR.JUSTICE S. D. ANAND

Present: Mr.Lokesh Sinhal, Advocate for the petitioners.

S. D. ANAND, J.

1. Relying upon an arbitration clause, the learned Trial Judge allowed a plea preferred by defendant-respondents to refer the matter to the Arbitrator. It is that order dated 7.9.2007 of the learned Additional Civil Judge (Senior Division), Gurgaon which is under challenge in the present petition before this Court.

2. The facts, as apparent from the material obtaining on the file including the Collaboration Agreement (Annexure P5) which was placed on file by means of C.M. No.21331-CII of 2007, are as under.

3. The plaintiff-petitioners and respondent No.1 – M/s Omaxe Housing & Developers Ltd. (hereinafter referred to as the respondent-builder) are parties to the impugned Collaboration Agreement. Clause 41 thereof, which was relied upon by the learned Trial Court to grant the impugned order, is re-produced as under in the first instance for facility of reference:

> "The parties hereto agree that if any dispute and/or difference arises between the parties in respect of the present Collaboration Agreement and the same shall be settled through arbitration by the sole arbitrator namely Shri Rohtas Goel, Chairman & Managing Director of the Company. It is also agreed between the parties that the arbitration process shall be in accordance of the Arbitration and Conciliation Act, 1966. The award so made by the sole arbitrator shall be final and binding on the parties. It is agreed between the parties that the arbitration proceedings shall be conducted in Delhi only. That the Punjab and Haryana High Court at Chandigarh, and Courts in Gurgaon subordinate to it, alone shall have jurisdiction in all matters arising out of, touching and/or concerning this transaction."

4. Thereafter, the plaintiff-petitioners also executed a General Power of Attorney (Annexure P6) authorizing respondent No.1 (and its named nominees) to do a number of acts for purposes of execution/implementation of the impugned Collaboration Agreement.

5. As per the verbal averment made before this Court, respondent No.1 sold away the licence obtained by it and also the land which is the subject of impugned Collaboration Agreement.

6. Respondent No.1 had filed a plea for reference to arbitration on the strength of the above quoted arbitration clause. That plea was upheld by the learned Trial Court.

7. The grievance of the petitioners is that the controversy in the suit is with regard to the incompetence of respondent No.1 to sell the land in

suit to respondent No.2. The plea raised thereby is that the matter pertaining to the validity or otherwise of that sale-deed is not referable to arbitration in terms of the arbitration clause mentioned in para No.3 of this order.

8. As would be evident from a perusal of the Clause 10(c) of the Collaboration Agreement, respondent No.1 was entitled to transfer and assign the rights in the licence etc. granted by the competent Authorities to develop and construct a Group Housing Residential Complex on the said land to a third party for such price and on such terms and conditions as the Builders may in consultation with the Owners decide. "In that eventuality, the sale proceeds shall be shared by the parties in the agreed ratio specified herein i.e. 10:90".

9. The impugned sale-deed (or a copy thereof) has not been placed on the file before this Court. If a builder is authorized, on consensual basis, to transfer the rights in the licence, it follows therefrom that the builder would be entitled to transfer the land as well to which (land) that licence is relatable. The mere transfer of a licence, without transfer of the land, would be meaningless and illogical. The converse would also be true.

10. Confronted with the predicament of having to explain the above condition of the impugned Collaboration Agreement, the learned counsel for the plaintiff-petitioners raised an alternative plea to the effect that the petitioners having opted to go to the Civil Court could not be compelled to resort to the arbitration proceedings. In support of the averments, the learned counsel relies upon **Wellington Associates Ltd. Vs. Kirit Mehta,** 2000(1) Apex Court Journal 587. In particular, the

learned counsel relied upon paras 22 and 23 thereof which are re-produced hereunder for facility of reference:

> "22. It is contended for the petitioner that the word 'may' in clause 5 has to be construed as 'shall'. According to the petitioner's counsel, that is the true intention of the parties. The question then is as to what is the intention of the parties? The parties, in my view, used the words 'may' not without reason. If one looks at the fact that clause 4 precedes clause 5, one can see that under clause 4 parties desired that in case of disputes, the Civil Courts at Bombay are to be approached by way of a suit. Then follows clause 5 with the words 'it is also agreed' that the dispute 'may' be referred to arbitration implying that parties need not necessarily go to the Civil Court by way of suit but can also go before an arbitrator. Thus, clause 5 is merely an enabling provision as contended by the respondents. I may also state that in cases where there is a sole arbitration clause couched in mandatory language, it is not preceded by a clause like clause 4 which discloses a general intention of the parties to go before a Civil Court by way of suit. Thus, reading clause 4 and clause 5 together, I am of the view that it is not the intention of the parties that arbitration is to be the sole remedy. It appears that the parties agreed that they can "also" go to arbitration also in case the aggrieved party does not wish to go to a Civil Court by way of a suit. But in that event, obviously, fresh consent to go to arbitration is necessary. Further, in the present case, the same clause 5, so far as the Venue of arbitration is concerned, uses word 'shall'. The parties, in my view, must be deemed to have used the word 'may' and 'shall' at different places, after due deliberation.
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> 23. A somewhat similar situation arose in B.Gopal Das V. Kota Straw Board (supra). In that case the clause read as follows:
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> "That in case of any dispute arising between us, the matter may be referred to arbitrator mutually agreed upon and

acceptable to you and us."

It was held that fresh consent for arbitration was necessary. No doubt, the above clause was a little clearer there than in the case before me. In the above case too, the clause used the word 'may' as in the present case. The above decision is therefore directly in point."

11. The plea advocated is not supported by the judgment relied upon. In that case, clauses 4 and 5 in the impugned two agreements dated 15.8.1995 appeared in the following order:

"Clause 4: It is hereby agreed that, if any dispute arises in connection with these presents, only courts in Bombay would have jurisdiction to try and determine the suit and the parties hereto submit themselves to the exclusive jurisdiction of the courts in Bombay.

Clause 5: It is also agreed by and between the parties that any dispute or differences arising in connection with these presents may be referred to arbitration in pursuance of the Arbitration Act, 1947, by each party appointing one arbitrator and the arbitrators so appointed selecting an umpire. The venue of arbitration shall be at Bombay."

12. It was on interpretation of both the clauses that the Apex Court held that resort had to be had to the Civil Courts in the first instance. This inferential observation would be apparent from what stands quoted in para No.10 of this order.

13. In the present case, on the other hand, the Arbitration Clause appears first in point of time and there is no clause corresponding to the above quoted clause No.4.

14. The material obtaining on the file does not at all support the plea raised on behalf of the petitioner in the context.

15. The petitioners shall, of course, be entitled to raise whatever

plea they want to, in order to assail the competence/validity or otherwise of the impugned transfer of licence/land by respondent No.1 to respondent No.2 before the Arbitrator. The award passed by the Arbitrator shall, of course, be equally subject to the Civil Court jurisdiction of the area indicated in the concluding sentence of Arbitration Clause 41 of the impugned Collaboration Agreement.

16. Dismissed in limine.

(S. D. ANAND)
JUDGE

November 5, 2007
SRM

Note: Whether referred to reporter ? Yes/No